BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinions Below

The opinion for the Circuit Court of Appeals for the Third Circuit, filed February 15, 1943, has not yet been officially reported, but a copy is to be found in the record (R. 30). The opinions of the District Court for the District of Delaware are likewise to be found in the record (R. 18a, 24a), the opinion on the motion to quash being reported in 44 F. Supp. 375.

II.

Statement of the Case

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed February 15, 1943, affirming his conviction and sentence entered in the United States District Court for the District of Delaware on June 24, 1942 after a trial before the Honorable Albert L. Watson, sitting without a jury.

Petitioner contended throughout the proceedings that he was entitled to a trial by jury and that the court had no power to punish him summarily in that he was charged with substantive crimes.

The pertinent facts have been set forth in the foregoing petition (pp. 1-4) and will not be repeated.

III.

Argument

1. Petitioner Was Entitled to a Trial by Jury

We submit that one charged with contempt cannot be tried summarily, but has a right to a trial by jury (1) where the basis of the contempt consists of alleged perjurious and contumacious testimony given before a grand jury and of alleged subornation of perjury attempted outside the grand jury room, (2) while the court was not in session, (3) where the proceedings were not immediately instituted and where the hearing was not had until several months thereafter, (4) where the court had no personal knowledge of the situation and consequently had to take testimony to develop the facts, (5) where the alleged contempt constituted separate and distinct crimes and (6) where the misconduct, if any, did not disrupt quiet and order or actually interrupt the court in the conduct of its business.

We have found no case in which an alleged contemnor has been deprived of his basic right to a trial by jury under circumstances which even remotely approach those existing in the instant case. On the contrary, it is our position that the case of *Nye v. United States*, 313 U. S. 33, is authority in support of our contention.

In the Circuit Court, the Government cited the case of *O'Malley & Pendergast v. United States*, 128 F. 2d 676, as authority for its view that the *Nye* case was inapplicable to the present facts. The opinion of the trial judge on which the Circuit Court relied in the case at bar was based

substantially on the opinion in the same case in the lower court (39 F. Supp. 189).

Although the very point at issue herein (the scope and application of the *Nye* decision) was specifically raised in the Supreme Court in the *Pendergast* case, the Court did not pass any opinion thereon in that the point was not necessary to its decision (87 L. ed. 275, 278).

For this reason, we believe this Court should review the decision herein to determine finally the scope and meaning of the *Nye* case as applied to an alleged contempt committed outside the view of the "judicial eye". (cf. *Ex Parte Terry*, 128 U. S. 289, 312).

The proceeding against the petitioner herein was instituted under Section 268 of the Judicial Code (derived from Section 1 of the Act of March 2, 1831) which provides as follows (28 U. S. C. A. 385):

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The acts charged, however, fall also within certain sections of the Criminal Code, to wit, Section 125 defining perjury (18 U. S. C. A. 231), Section 126 defining subornation of perjury (18 U. S. C. A. 232) and Section 135 which provides as follows (18 U. S. C. A. 241):

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

This last quoted Section of the Criminal Code (135) was derived from Section 2 of the Act of 1831 which provides:

"That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct or impede, or endeavor to obstruct or impede the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense."

The basic question presented is whether Section 268 of the Judicial Code may be so construed as to permit a

summary punishment for a contempt of court which consists of giving perjurious and obstructive testimony before a grand jury and attempting to suborn the perjury of a witness in a corridor directly outside the grand jury room.

The *Nye* case held that the construction of the first section of the Act of 1831 (now Section 268 of the Judicial Code) was best expressed in *Ex Parte Poulson,* (CC) Fed. Cas. No. 11,350 (1835) wherein it was held to allude "to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business".

The *Nye* case concluded also that "the category of criminal cases which could be tried without a jury was narrowly confined" and unless the requirements of Section 268 "are clearly satisfied an offense will be dealt with as the law deals with the run of illegal acts."

We contend that the above rules laid down in the *Nye* decision, coupled with the holding that the words "so near thereto" have a geographical connotation, make certain that the type of contempt charged herein is not summarily punishable. Despite previous decisions to the contrary, a contempt committed before a grand jury is not one in the "presence" of the court, insofar as summary punishment is concerned, since the logical requirements of the *Nye* case mean necessarily that "presence" is actual, physical presence.

It is an absurdity to talk about physical proximity to a "constructive" presence and we submit that a court may proceed to punish summarily for contempt only when it is so "present" that its order may be disturbed by "noise, tumultuous or disorderly behavior", or similar misbehavior.

The Circuit Court relied on one of its previous de-

cisions to support its ruling herein: *Camarota v. United States,* 111 F. 2d 243. There the alleged contempt was the refusal of the witness to answer questions on the ground of self-incrimination. The witness was told to appear before a district judge who had convened court in the grand jury room, and he did appear with counsel. He was told that a presentment would be filed against him and a hearing set for the following week. The presentment was filed on the next day and a hearing was held a week thereafter. He was adjudged guilty of contempt in refusing to answer the questions, and allowed one week within which to purge himself, which he refused to do and thereafter he was committed.

This case was decided before the *Nye* decision, but even so it differs fundamentally from the case at bar. In the first place, the contemnor was not charged with the commission of substantive crimes. Likewise, there was no factual dispute and the trial judge had personal knowledge of the contempt which might be said to have been committed in his actual, physical presence.

We respectfully submit that the *Camarota* case should not be held to control the case at bar, especially after the decision of this court in the *Nye* case which stands for the proposition that an act which is alleged to be contemptuous and which also constitutes a crime is not punishable unless it *clearly* is necessary "to insure order and decorum in court".

The *Nye* case has been so interpreted in several recent decisions in other Circuit Courts of Appeal. Thus, in *Wimberly v. United States,* 119 F. 2nd 713 (C. C. A. 5, 1941) it is said (1714):

> "The gist of the decision is that if the misconduct does not disrupt quiet and order or actually interrupt the court in the conduct of its business, the offender may not be summarily punished for contempt."

To the same effect are *Schmidt v. United States,* 124 F. 2d 177 (C. C. A. 6, 1941); *Gillon v. United States,* 124 F. 2d 1018 (C. C. A. 5, 1942); *McKee v. United States,* 126 F. 2d 470 (C. C. A. 6, 1942); see also *Millinocket Theatre, Inc. v. Kurson,* 39 F. Supp. 979 (D. C. Me., 1941) and the excellent dissenting opinion of Judge Riddick in *O'Malley, Pendergast et al. v. United States,* 128 F. 2d 676, wherein he said (p. 690):

> "* * * in cases in which the question is of the power of the court to punish a criminal summarily in a manner different from that commonly and ordinarily provided for criminal trials, the question of the court's power must be of the gravest importance. The gravity of the crime only adds to the gravity of the question with which the court is confronted. In the administration of justice, the courts are in duty bound to exercise the full jurisdiction conferred upon them, and equally bound not to exceed it."

We do not contend now, nor have we ever contended, that merely because a crime is charged, a court loses its power to proceed for contempt. Our point is, however, that if the alleged contempt also constitutes a crime, the court should not proceed summarily unless it is clearly necessary to preserve its order and dignity.

Conclusion

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the adverse decision.

Respectfully submitted,

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Counsel for Petitioner.